PATENT RIGHTS AND COPY RIGHTS.[1]

AN author, musical composer, artist, or inventor has a natural right to the unlimited use and enjoyment of his literary, musical, or artistic creation, or of his invention. It is the duty of the State to recognize and protect this right, but the State does not confer the right.

Nor does this right depend upon whether the author, musical composer, artist, or inventor has property in his creation or invention. If he have such property, his right of use and enjoyment is, it seems, an incident of his right of property. But, though he have no right of property, yet he has the right[2] of use and enjoyment, because he can exercise such right without committing any wrong against any other person, and because no other person can prevent his exercising such right without committing a wrong against him.

As the literary, musical, or artistic creation of an author, musical composer, or artist is embodied in a chattel and as an author, musical composer, or artist is always assumed to own the chattel which embodies his creation, it follows that an author, musical composer, or artist owns his literary, musical, or artistic creation, regarded as a chattel, as absolutely as he can own any chattel. An invention, on the contrary, is incapable of being embodied, and therefore an inventor can have no ownership of his invention as a chattel. And yet an inventor has, for the reason just stated, as unlimited a right to the use and enjoyment of his invention as an author, musical composer, or artist has of his creation.

What means has an author, musical composer, artist, or inventor of preventing the use and enjoyment of his creation or invention by others? An author, musical composer, or artist has all the means which are given him by his absolute ownership and control of the chattel which embodies his creation; and he has no other means, unless upon some principle not yet indicated. The only means that an inventor has, on any principle yet indicated, of preventing the use and enjoyment of his invention by others is that

[1] The following paragraphs were prepared as a part of a lecture; and they are printed here, through the kindness of the Editor, instead of being read to the Class.

[2] Such right should, it seems, be classified as a personal right.

of keeping it secret; but this, of course, will be ineffective, unless the invention be of such a nature that its author can use and enjoy it without disclosing it to others.

Has an author, musical composer, artist, or inventor a property in his literary, musical, or artistic creation, or in his invention, regarded as an incorporeal thing? If he have, this will furnish him with another and effective means of preventing the use and enjoyment of his creation or invention by others without his consent. If such a property exist, it is not created by the State, but is deduced as a consequence of the creation or invention. If such a property does not exist otherwise, doubtless it might be created by the State; but it is believed that no State ever has created such a property.

That an author or musical composer has such a property in his creations before publication of them, using the term publication in its ordinary acceptation, is well settled by authority, and seems clear upon principle. And if such a property exists before publication, there seems to be no good reason why publication should put an end to it. Yet it must be, it seems, deemed settled by authority that such property ceases on publication, though whether because of publication, or in consequence of the expressed will of the Legislature, is not clear.

What has been said in the last paragraph of an author and musical composer seems to be true also of an artist, though there is a dearth of authority on this question in regard to artists.

As an invention cannot be embodied in a chattel, and so is incapable of ownership regarded as a chattel, so it is incapable of ownership regarded as an incorporeal thing. For an inventor to become owner of his invention would be like an author's becoming owner of the ideas expressed in his literary composition merely because he was the first to express them. It is a well-known fact that the same thing is often invented by different persons at nearly the same time and independently of each other; and shall the inventor who happens to be first in time deprive all subsequent inventors forever of the right to use their own inventions? Such a right in a first inventor would be intolerable, and would bear no resemblance to an author's musical composer's or artist's right of property in his own literary, musical, or artistic creation. Such a right as the latter imposes no restraint whatever upon other literary, musical, or artistic creations; and in fact it clashes with the interests of only one class of persons, namely, those who desire to reap where others have sown.

Are there no other means by which an author, musical composer, artist, or inventor may prevent the use and enjoyment by others of his creation or invention without his consent? Yes, the State may interfere in his favor by issuing its prohibition against the use of his creation or invention by others without his consent, and by arming him with the power to enforce such prohibition; and this is what the State does when it grants letters-patent to an inventor, or enacts a law for the protection of authors, musical composers, or artists. The right thus secured to the inventor by letters-patent is a monopoly in the true sense; for it makes unlawful, except to one or a few, what, but for such letters-patent, would be lawful to all. The right thus secured by law to an author, a musical composer, or an artist may also be termed a monopoly in the strict legal sense; for such laws always assume that authors, musical composers, and artists have, after publication, no property in their creations, regarded as incorporeal things, and they confer a right which is wholly independent of any such property.

The right thus conferred by letters-patent, or by law, may properly enough be termed incorporeal property; but it is incorporeal property of a peculiar kind, being wholly negative in its nature, and it is therefore radically different from an author's, a musical composer's or an artist's property in his literary, musical, or artistic creations, regarded as incorporeal things.

It follows from what has been said that if letters-patent be granted to two or more persons as joint inventors, the only right conferred upon them is that of preventing the use and enjoyment of the invention by others; no right is conferred upon them as against each other, and therefore each of them may use and enjoy the invention, without accountability to the other, as if the letters-patent had been issued to him alone.[1] And the same thing must be true of two or more joint creators of any literary, musical, or artistic production, so far as regards the right conferred upon them by statute; but it is otherwise as to any property which authors, musical composers, or artists have in their creations, for such property, being positive and affirmative in its nature, is subject to the ordinary rules of property owned by several persons jointly or in common.

There is another important distinction between the affirmative

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[1] Mathers *v.* Green, 34 Beav. 170; L. R., 1 Ch. 29, s. c.

right which an author, a musical composer, or an artist, has in his unpublished literary, musical, or artistic creation, and the negative right which is conferred by letters-patent upon an inventor, or by statute upon an author, a musical composer, or an artist, whose literary, musical, or artistic creation has been published, namely, that, while the former will be recognized and protected throughout the civilized world, the latter can have no existence, except within the jurisdiction of the sovereign by whom the letters-patent were issued, or the statute was made; and a consequence is that the publication of a literary or musical creation, designed for representation on the stage, is more likely to be a source of pecuniary loss than of pecuniary profit to its author or composer.

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